WAYNE JACKSON	)	BRB No. 03-0629
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: JUN 15, 2004
	)	
Self-Insured Employer-Petitioner	)	
	)	
	)	
PHILLIP ATKINS	)	BRB No. 03-0651
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeals of the Decisions and Orders of Robert D. Kaplan, Administrative Appeals Judge, United States Department of Labor.

Gregory E. Camden and John H. Klein (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimants Jackson and Atkins, respectively.

Jonathan H. Walker and Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2002-LHC-02963) of Administrative Law Judge Robert D. Kaplan in the case of Claimant Jackson, and Claimant Atkins appeals the Decision and Order and the Supplemental Decision and Order Upon Claimant's Motion for Reconsideration (2002-LHC-02940) of Administrative Law Judge Robert D. Kaplan rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). Before us in both cases is the issue of whether employer validly "tendered" compensation within the meaning of Section 28(b) of the Act, 33 U.S.C. §928(b), such that employer cannot be held liable for claimants' attorney's fees. Therefore, we consolidate these cases for decision. 20 C.F.R. §802.104(a).

JACKSON

Claimant Jackson injured both wrists at work on March 13, 2000. Pursuant to a stipulated compensation order issued by the district director, employer paid claimant temporary total disability benefits and permanent partial disability benefits for a ten percent right arm impairment. The parties agreed to defer a decision as to Jackson's entitlement to additional compensation for any left arm impairment. Jackson subsequently sought permanent partial disability benefits for a left arm impairment. Within five days of Jackson's claim, employer sent a letter to claimant's counsel stating that employer was "unconditionally tendering" compensation for a five percent impairment of the left arm. Employer enclosed proposed stipulations, which included the following statement: "That the parties are aware of no other outstanding issues as of the date of the execution of these stipulations." Claimant refused to agree to this language, and employer responded that it would like to know what were the other issues. Claimant's counsel replied that he would never agree to such language because an administrative law judge in another case found that such language precluded the claimant from raising his entitlement to benefits for additional subsequent disability. Employer did not respond, and the case was forwarded to the Office of Administrative Law Judges (OALJ) for a hearing. At this point, Jackson also raised his entitlement to a Section 14(e) penalty, 33 U.S.C. §914(e), averring that employer did not timely controvert the claim for a permanent left arm impairment.

The parties stipulated before the administrative law judge that Jackson has a five percent impairment to the left arm, and that employer is liable for a Section 14(e) penalty and interest on the benefits due for the left arm impairment. The administrative law judge accepted these stipulations and proceeded to address claimant's entitlement to an

attorney's fee payable by employer. Employer contended it is not liable for a fee under Section 28(a) because it did not "decline to pay benefits" or under Section 28(b) because it tendered to Jackson, before the case was transferred to the OALJ, benefits for the five percent left arm impairment to which the parties ultimately agreed. Claimant countered that the tender was not unconditional because of the "offensive" stipulation, and that when the case went before the administrative law judge, employer agreed to drop this stipulation, and, in addition, employer agreed to pay the Section 14(e) penalty and interest.

The administrative law judge found that employer's tender was not unconditional pursuant to the Board decision in *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986) (*en banc*), and that Jackson established that he had the right to insist on the removal of the proposed stipulations because unforeseen events could cause the language to be to his detriment. Thus, the administrative law judge awarded claimant's counsel an attorney's fee of approximately $3,000, payable by employer, as claimant successfully prosecuted the claim in that he obtained the additional permanent partial disability benefits without having to agree to the proposed stipulation.[1] Employer appeals the administrative law judge's award of an attorney's fee, contending that it tendered compensation to claimant and that claimant did not obtain greater compensation by virtue of the proceedings before the administrative law judge. Claimant Jackson responds, urging affirmance of the fee award.

ATKINS

Claimant Adkins injured both knees at work on September 25, 2001. On August 7, 2002, employer "unconditionally tendered" compensation for temporary total disability from January 10 to July 7, 2002, and for temporary partial disability on July 9 and 10, 2002. Employer had already paid all but $1,700 of the amount tendered. Employer's proposed stipulations included the language, "That the parties are aware of no other outstanding issues as of the date of the execution of these stipulations." Claimant Atkins would not agree to this language, and employer sought clarification both at the informal conference and thereafter regarding what other issues were unresolved. There is no response in the file before the Board.

[1] The administrative law judge specifically found that the award of interest and a Section 14(e) penalty cannot be the basis for fee liability in this case because employer's liability therefor was merely incidental to the delay in the resolution of the case on the merits, and could entice claimant's counsel to delay resolution of a case merely to obtain this additional benefit in order to obtain an employer-paid attorney's fee.

The case was forwarded to the OALJ. The parties stipulated before the administrative law judge as to Atkins's entitlement to benefits, and employer agreed to drop the offending stipulation. Claimant's counsel sought a fee of $1,500 payable by employer. Employer objected on the ground that it made a valid tender under Section 28(b). Claimant responded that the tender was not unconditional, and that, moreover, the language of the stipulation was untrue, in that his entitlement to an attorney's fee remained at issue.

The administrative law judge denied claimant Atkins an employer-paid fee. He discussed his decision in *Jackson*, wherein he found that the tender was not unconditional because claimant Jackson had explained why the offending language was to his detriment. He found the *Atkins* case distinguishable because claimant's counsel stated that the only reason he objected to the proposed stipulation was that his attorney's fee remained at stake. The administrative law judge found that this was an improper attempt to shift fee liability, and that counsel provided no other persuasive reason why the language was "offensive" in this case. Thus, he found that as employer tendered compensation and as claimant Atkins did not obtain additional benefits, employer is not liable for an attorney's fee for work before the administrative law judge. In denying claimant's motion for reconsideration, the administrative law judge found that counsel made an "admission against interest" which distinguishes the case from *Jackson*. Claimant Atkins appeals the denial of an attorney's fee payable by employer contending that employer's tender of compensation was not unconditional. Employer responds, urging affirmance.

SECTION 28(b) – TENDER

Employer can avoid liability for an attorney's fee pursuant to Section 28(b) of the Act if it pays or tenders to claimant compensation without an award and claimant fails to obtain greater compensation than employer paid or tendered. *See generally Savannah Machine & Shipyard Co. v. Director, OWCP,* 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981). These cases present the issue of what constitutes a valid "tender" within the meaning of Section 28(b) of the Act. Section 28(b) states:

> ***If the employer or carrier pays or tenders payment of compensation without an award*** pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the [district director] . . . shall set the matter for an informal conference and following such conference the [district director] . . . shall recommend in writing a disposition of the controversy. If the employer or carrier refuse [*sic*] to accept such written recommendation, within fourteen days after its receipt

> by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation . . . .

33 U.S.C. ' 928(b) (emphasis added). The word "tender" is not defined in the statute. In *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986) (*en banc*), the Board held that an offer to settle a claim may constitute a valid tender if the offer demonstrates "a readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make . . . a payment to the claimant." *Armor*, 19 BRBS at 122.[2] Recently, in *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003), the Ninth Circuit quoted BLACK'S LAW DICTIONARY at 1479 (7th ed. 1999), and stated that a "tender" is "'an *unconditional* offer of money or performance to satisfy a debt or obligation.'" *Richardson*, 336 F.3d at 1107, 37 BRBS at 83(CRT) (emphasis in original). In addition, the Fifth Edition of BLACK'S defines "tender" as "an offer of money . . . in satisfaction of [a] claim or demand, *without any stipulation or condition.*" BLACK'S LAW DICTIONARY at 1315 (5th ed. 1981) (emphasis added). Pursuant to these definitions and in conjunction with the Board's decision in *Armor*, we hold that a "tender" under Section 28(b) must be an offer to pay, expressed in writing, without any conditions attached thereto.[3]

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[2] The Board overruled prior cases holding that employer actually had to proffer funds to claimant in order to have tendered compensation. The Board held in *Armor* that such a requirement essentially read the statute as requiring employer to "pay or pay" compensation to avoid fee liability rather than to "pay or tender" compensation. *Armor*, 19 BRBS at 122.

[3] The Ninth Circuit in *Richardson* rejected the claimant's contention that the tender therein was conditional because claimant was required to drop his claim if he accepted employer's offer. The court stated, "The condition of dropping a claim is implicit in all tenders because they are made 'to satisfy a debt or obligation.' [citation omitted]. A tender is called an 'unconditional' offer only because there are no additional conditions." *Richardson*, 336 F.3d at 1107, 37 BRBS at 83(CRT). In *Richardson*, employer's tender of compensation was an offer to settle the claim pursuant to Section 8(i), 33 U.S.C. §908(i). *See also Armor*, 19 BRBS 119. As the purpose of Section 8(i) is to permit a claimant to relinquish his claim in exchange for a sum of money, "dropping a claim" is implicit in any tendered settlement offer.

The administrative law judge, in essence, found that whether a tender is unconditional should be decided on a case-by-case basis. Specifically, he looked to whether the claimants had a valid reason for rejecting the proposed stipulation that accompanied employer's tender of compensation. In *Jackson*, he found claimant's reason to be convincing, and therefore that employer's tender was impermissibly conditional. In *Atkins*, he found claimant's reason to be unpersuasive and a ploy to shift fee liability to employer. As a tender must be "unconditional," however, it cannot be dependent on the validity of claimant's reasons for rejecting a condition or stipulation imposed by employer. The administrative law judge's approach shifted to claimants the burden to justify their refusals to accept the stipulations that accompanied the offers of compensation, when the burden is properly on employer to establish that it tendered compensation within the meaning of the Act in order to avoid fee liability. In these cases, employer offered to pay compensation, but required that claimants accept a stipulation in return. Therefore, we hold that the offers to pay were not "unconditional" and are not "tenders" within the meaning of Section 28(b) of the Act. The fact that employer termed its tenders "unconditional" or deemed the stipulations to be innocuous in the instant cases cannot establish that the offers to pay were indeed unconditional for purposes of Section 28(b).

Thus, as employer did not validly tender compensation in these cases, and as claimants obtained greater compensation by virtue of the proceedings before the administrative law judge, employer is liable for claimants' attorney's fees. In *Jackson*, we affirm the administrative law judge's fee award, as employer does not contest the amount of the awarded fee.[4] We reverse the administrative law judge's denial of an employer-paid attorney's fee in *Atkins*, and we remand the case for the administrative law judge to determine the amount of a reasonable attorney's fee. 20 C.F.R. §702.132.

[4] We reject employer's assertion in *Jackson* that it cannot be held liable for an attorney's fee because it did not "decline to pay" benefits pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). Although employer did not decline to pay, it did not actually pay benefits, but purported to tender compensation. Under these circumstances, employer's liability is properly assessed pursuant to Section 28(b).

Accordingly, the administrative law judge's Decision and Order in *Jackson* is affirmed. The administrative law judge's Decision and Order in *Atkins* is reversed, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge